# HOTEL SENTRAL (JB) SDN BHD v. PENGARAH TANAH DAN GALIAN NEGERI JOHOR, MALAYSIA & ORS

HIGH COURT MALAYA, JOHOR BAHRU
MOHD NAZLAN GHAZALI JC
[JUDICIAL REVIEW NO: 25-27-07-2014]
2 FEBRUARY 2016

***LAND LAW:*** *Alienation of land – Road reserve – State Authority's decision to revoke road reserve and alienate it to fourth respondent – Judicial review – Application for – Failure to comply with provisions under s. 64(1) National Land Code – Whether decision to alienate null and void – Whether decision susceptible to judicial review – Whether applicant adversely affected by alienation of land – Whether land gazetted as reserved land – Whether a State land – Powers of State Authority to alienate land – Whether challenged – Whether alienation made for public purpose – Whether State Authority made party to application – Whether decision to alienate land set aside – National Land Code, ss. 5, 16(2), 40(a), 44(1)(b), 62 & 76(aa)(iii)*

***CIVIL PROCEDURE:*** *Parties – Actions by and against State Authority – National Land Code, s. 16 – State Authority's decision to revoke road reserve and alienate it to fourth respondent – Application for judicial review to quash decision – Whether State Authority made as a party to application – Whether action brought against State Director in the name of his office – Whether application to quash decision allowed*

The dispute in this case arose from the decisions made by the first, second and third respondents to alienate a road reserve ('the said land') and to revoke the status of the said land as a reserved land. The applicant was the owner of a hotel known as Hotel Sentral which was situated on Lot 2897 and the fourth respondent was the registered owner of the land formerly held under Lot 3270. The applicant purchased Lot 2897 together with Hotel Sentral from Naza Hotel (Malaysia) Sdn Bhd and contended that the manner in which Hotel Sentral was constructed followed the approved Bomba plans. The said road reserve was situated between Lot 2897 and Lot 3270. The applicant argued that the decision to revoke the road reserve and thereafter to alienate it to the fourth respondent was null and void and of no effect. As a result, the applicant applied for judicial review under O. 53 of the Rules of Court 2012 ('ROC') to quash the said decision. It was alleged that the road built on the said land had been utilised by the public at large, including Hotel Sentral, as a way to access the hotel's basement car park. It was contended that the State Authority did not comply with the provisions under s. 64(1) of the National Land Code ('NLC') when it decided to revoke the road reserve and to alienate it to the fourth respondent. However, the first and second respondents, being the Director of Lands and Mines and the Registrar

of Titles, Johor Bahru, submitted, *inter alia,* that (i) the said land had never been gazetted as a reserved land under the NLC; and (ii) the decision to alienate the said land was made by the State EXCO as the State Authority and the applicant should have rightfully made the State Authority as a party to this application. The third respondent, being the local authority, averred that it had nothing to do with the decisions made as it was plainly within the jurisdiction of the State Authority. It was also argued that the third respondent was not empowered under any of the provisions of the Local Government Act 1976 to reverse the State Authority's decision in having allegedly revoked the road reserve and alienating it to the fourth respondent. The fourth respondent submitted that the alienation of the said land in perpetuity was not *ultra vires* the requirement that such alienation must be for a public purpose since s. 76(aa)(ii) of the NLC which provides for 'special circumstances' would apply, considering that the fourth respondent's original title for Lot 3270 which was surrendered for amalgamation had previously been held in perpetuity. It was also argued that the applicant was not an aggrieved person and did not have the *locus standi* to institute this proceeding.

**Held (dismissing application with costs):**

**(1)** The requirements of s. 64 of the NLC must be strictly adhered to in order to effect the revocation of reserved land. Section 62(1) of the NLC empowers the State Authority to reserve any State land for any public purpose. On the facts, since the said land had not been gazetted, it could not, by law, be considered as a reserved land within the meaning and ambit ascribed to it by ss. 5 and 62(1) of the NLC. The said land would continue to be State land and by virtue of s. 40(a) of the NLC, it remained vested with the State Authority. As such, the premise of the applicant's primary contention that assumed the said land being a reserved land was wholly misconceived and unsustainable. (paras 38, 41, 43 & 49)

**(2)** The applicant's argument that the State Authority could not be allowed to take advantage of its own failure to gazette the said land as reserved land fell short on substance and could not be accepted. The State Authority has wide powers of disposal and the power of alienation is vested exclusively in the State Authority. It was entirely within the discretionary power of the State Authority to decide whether or not to reserve any State land. The State Authority does not have a legal duty to ensure the gazetting of a land proposed to be reserved, after one is identified, nor, to state the obvious, even to create a reserve land under s. 62(1) in the first place. A breach on the part of the party said to be taking advantage of his own wrong must first be established. On the facts, it had not been shown what was the breach or non-compliance on the part of the State Authority that could give rise to the application of the principle. (paras 44, 45, 46 & 61)

**(3)** Legitimate expectations cannot override the express statutory provisions of the NLC. There was no promise or expectations given to the applicant *vis-à-vis* the use of the said land. Thus, given that the said land or 'road reserve' was plainly not under the law a reserved land since there was no gazette notification to that effect under s. 62(1) of the NLC, it was manifest that the issue of whether the status of the said land as a reserved land was validly revoked in accordance with s. 64 did not arise. No revocation took place in fact and under the law and there was no decision that was susceptible to judicial review since there was no offending act or omission to speak of. (paras 50 & 51)

**(4)** Under O. 53 r. 2(4) of the ROC, any person who is adversely affected by the decision in relation to the exercise of a public function is entitled to make an application for judicial review. The applicant fell short of establishing itself to be a person who was adversely affected or in any validly legitimate manner, aggrieved by the decision of the State Authority in its alienation of the said land to the fourth respondent under O. 53 r. 3(4). The applicant was not the original owner of the hotel and its belief or assumption on the status of the said land being a reserved land without evidence of having undertaken due enquiries on the same with the rightful and appropriate authorities could not be a legitimate basis for making them an aggrieved party within the contemplation of O. 53. Further, the applicant lacked the requisite *locus standi* to pursue this application since it was not a person adversely affected by the decision to alienate the said land to the fourth respondent. (paras 52, 53, 59 & 60)

**(5)** Even if it was true that the said land or 'road reserve' was a reserved land, it was by definition meant for public purposes. Any use or benefit accruing to the applicant such as to use it to gain access to its hotel's basement car park prior to the alienation to the fourth respondent must therefore have been purely on the same basis of what other members of the public could similarly have enjoyed and benefited from. The said land, if it was a reserved land, could not lawfully have been intended to specifically benefit the applicant. Further, the fourth respondent averred that the alienation was in respect of and in pursuance of an amalgamation which involved another land of the fourth respondent which was already held in perpetuity. As such, there was a legitimate basis of special circumstances referred to in s. 76(aa)(iii) of the NLC. (paras 53 & 63)

**(6)** The applicant was not in possession of the crucial approved building plans and in the absence of the same, it was difficult to determine whether access to the car park had actually been approved to be through the said land. The architect's professional opinion could not be said to be based on sound grounds and supported by the basic facts. It did not rely on the approved building plans but on the approved Bomba plans

inclusive of various amendments up to 16 October 2002 which were assumed to have been consistent with the approved building plan. The Hotel obtained its certificate of fitness on 20 June 2003. Thus, the integrity of this premise could be validly questioned since amendments made to the approved Bomba plans relied on by the architects' professional opinion could have been done after the approval of the building plans, rendering the expert report to be potentially speculative if not inaccurate. Further, the conclusion of the expert report that the effect of the alienation was to render Hotel Sentral to be in breach of the Street, Drainage and Building Act 1974 and the Uniform Building By Laws 1984 clearly constitutes an opinion of law which was not admissible (*Kassim Sulong & Anor v. Guthrie Estates Holdings Ltd & Ors;* refd). (paras 7, 54 & 55)

**(7)** The predominant and underlying issue was essentially one of internal access within the applicant's own land, specifically its basement car park. That being the case, the hotel owned by the applicant additionally could not benefit from s. 44(1)(b) of the NLC which entitles the applicant to the support of its land in its natural state by any adjacent land such as that of the fourth respondent. The hotel and the basement car park, being a relatively recent development, could not be construed as forming part of the natural state of the applicant's land. The situation here involves the withdrawal of the said land which was claimed to affect not the conditions of the natural physical support or stability to the land but instead, the access to the car park of the applicant's hotel. This cannot be remotely characterised to come within the ambit of the provisions under s. 44(1)(b) of the NLC. (paras 56, 57 & 58)

**(8)** The applicant had rightly named the first and second respondents in this action instead of the State Authority since s. 16(2) of the NLC provides that any action, suit or other proceedings relating to land in which it was sought to establish any liability on the part of the State Authority must be brought against the State Director in the name of his office. However, the applicant did not show that there was any form of error of law that could justify the intervention of public law remedy of *certiorari* against the decision to alienate. (para 64)

**Case(s) referred to:**

*Ahli-ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela Dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-Hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals [2012] 1 CLJ 805 FC* ***(refd)***

*Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374* ***(refd)***

*Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin [1997] 2 CLJ 248 CA* ***(refd)***

*Government Of The State Of Negeri Sembilan v. Yap Chong Lan & Ors And Another Case [1984] 2 CLJ 150; [1984] 1 CLJ (Rep) 144 FC* ***(refd)***

*Guan Soon Tin Mining Co v. Ampang Estate Ltd [1972] 1 LNS 39 FC* ***(refd)***
*Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159 SC* ***(refd)***
*Kassim Sulong & Anor As The Liquidators Of 10 Companies v. Guthrie Estates Holdings Ltd & Ors [1994] 3 CLJ 186 HC* ***(refd)***
*Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors [2005] 4 CLJ 169 CA* ***(refd)***
*Khoo Cheng & Ors v. Pentadbir Tanah Muar [2008] 3 CLJ 534 HC* ***(refd)***
*Malaysia Airline System Bhd v. Wan Sa'adi Wan Mustafa [2015] 1 CLJ 295 FC* ***(refd)***
*North East Plantations Sdn Bhd lwn. Pentadbir Tanah Daerah Dungun & Satu Lagi [2011] 4 CLJ 729 FC* ***(refd)***
*Pengarah Tanah dan Galian Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC* ***(refd)***
*Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd [1999] 3 CLJ 577 CA* ***(refd)***
*Petroliam Nasional Bhd v. Nik Ramli Nik Hassan [2003] 4 CLJ 625 FC* ***(refd)***
*QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor [2006] 2 CLJ 532 CA* ***(refd)***
*R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC* ***(refd)***
*Re Application by Dow Jones (Asia) Inc [1987] 1 LNS 103 HC* ***(refd)***
*Saeng-Un Udom v. PP [2001] 3 SLR 1* ***(refd)***
*Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA* ***(refd)***

**Legislation referred to:**
Evidence Act 1950, s. 57(1)(a)
National Land Code, ss. 4, 5, 16(2), 40(a), 41, 42, 44(1)(b), 62(1), (4)(a), 64(1), 76(aa)(ii), (iii), 78(3)
Rules of Court 2012, O. 53 rr. 2(4), 3(4)
Town and Country Planning Act 1976, s. 18

*For the applicant - CK Yeoh (CM Owee with him); M/s Owee & Ho*
*For the 1st & 2nd respondents - Wan Zainal; State Legal Advisor's Office, Johor*
*For the 3rd respondent - Mohd Faizal; M/s Hazelin & Assocs*
*For the 4th respondent - WJ Chen; M/s WJ Chen & Co*

*Reported by Kumitha Abd Majid*

## JUDGMENT

**Mohd Nazlan Ghazali JC:**

### Introduction

**[1]** In these judicial review proceedings, the applicant seeks to declare that the decisions made by the first, second and third respondents to firstly revoke what the former claimed to be a "road reserve" and thereafter, to alienate the said "road reserve" to the fourth respondent to be null and void and of no effect and that an order of *certiorari* be granted to quash the aforesaid decisions.

### Key Background Facts

**[2]** The applicant and MB Builders Sdn Bhd (the fourth respondent) are private limited companies incorporated in Malaysia.

**[3]** The applicant is and was at all material times the registered and beneficial owner of Lot 2897 where a 12 storey and two floor basement hotel known as Hotel Sentral is situated. The applicant bought Lot 2897 together with Hotel Sentral from Naza Hotel (Malaysia) Sdn Bhd.

**[4]** Pursuant to a separate sale and purchase agreement dated 16 May 2011, the applicant purchased two adjacent vacant lands held under Geran 45289 Lot 10578 and Geran 42590 Lot 10579 both in Bandar Johor Bahru, Daerah Johor Bahru. The applicant is now the registered proprietor of Lots 10578 and 10579, both of which were formerly known as one Lot 2898.

**[5]** At all material times, the fourth respondent is the registered owner of the land formerly held under Lot 3270.

**[6]** Crucially for present purposes, the said "road reserve" ("the said land") is situated between Lot 2897 (where Hotel Sentral is situated) and the former Lot 3270 in the form of a strip of land marked in the site plan exhibited as exh. A-6 to the applicant's first affidavit as "Jalan Lekas". The road built on the "road reserve" had been utilised by the public at large, including the applicant's Hotel Sentral. In this regard, the applicant had appointed Syarikat Mahyuddin Dan Siew Sdn Bhd, a licensed land surveyor to prepare a report, which concluded as follows:

(i) Lot 2895 came about as a result of the amalgamation of Lot 2120 and Lot 2872;

(ii) Lot 2895 was subsequently subdivided into smaller lots. The smaller lots included Lot 2897. The "road reserve" came about as a result of the subdivision; and

(iii) the effect of the subdivision was that parts of Lot 2895 were surrendered to the State, which included the subject matter "road reserve".

**[7]** Hotel Sentral obtained its certificate of fitness on 20 June 2003. The applicant claimed that when it purchased Lot 2897, the applicant was not given the approved building plans. What the applicant has are the approved Bomba plans, specifically, the plans endorsed by Bahagian Pencegah Dan Keselamatan, Jabatan Bomba dan Penyelamat Malaysia bearing file reference number JBPM/PK 31080, in respect of Hotel Sentral which included a site plan/key plan, basement two floor plan, basement one floor plan and four ground floor plan ("the approved Bomba plans").

**[8]** It is the contention of the applicant that the manner in which Hotel Sentral was constructed followed the approved Bomba plans. This is supported by Oon Yeet Yeet Jack, a professional architect who by way of an affidavit rendered an opinion entitled "architect's professional opinion".

**[9]** The architect's professional opinion stated that:

(i) the ingress and egress to the basement car park of Hotel Sentral is through the "road reserve"; and

(ii) designated car parks of Hotel Sentral were located next to the road reserved.

**[10]** As such, given that the said decisions to revoke the "road reserve" and thereafter alienating it to the fourth respondent have resulted in the "road reserve" now forming part of the new Lot 3270, the applicant contended that it had lost its access to the hotel basement car park.

**[11]** By a letter dated 21 April 2014 from MB Era Build Sdn Bhd ("MB Era") (a related corporation to the fourth respondent) which was received by a related company of the applicant on 22 April 2014, the applicant was informed that MB Era intended to hoard the new Lot 3270, in their own words '… Di Atas Lot 3270 Dan Rezab Jalan …".

**[12]** The hoarding was subsequently erected to allow the fourth respondent to commence construction work on the new Lot 3270. This is evidenced by the heavy machineries that had been mobilised on the site.

**[13]** The applicant only came to know of the developments concerning the "road reserve" upon receipt of the said 21 April 2014 letter. The applicant's subsequent complaints to the first three respondents were not, according to the former, satisfactorily addressed.

**[14]** The applicant contended that the State Authority made the decisions to purportedly revoke the "road reserve" and to alienate the same to the fourth respondent. Accordingly, Pengarah Tanah dan Galian Negeri Johor, Malaysia is named as a party (the first respondent), in order to ensure compliance with s. 16 of the National Land Code ("NLC"). The Registrar (second respondent) is, *inter alia,* responsible for the disposal of the State lands in the State of Johor by way of alienation and caused the issuance of the relevant issue document of title for the new Lot 3270 in favour of the fourth respondent. The Majlis Bandaraya (the third respondent) is the local authority having jurisdiction over the building plans concerning the subject matter of the proceedings herein, and the fourth respondent applied and caused the said land to be alienated in its favour, and now forming part of the new Lot 3270.

**Summary Of Contentions By The Applicant**

**[15]** The applicant submitted on the legal position that a public decision-maker is under an obligation to exercise its decision reasonably and in accordance with the terms of the relevant statute that confers the power or discretion, and made references to leading case law authorities such as the Supreme Court's decision in *Pengarah Tanah dan Galian Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135.

**[16]** The applicant contended that the State Authority had failed to abide by the provisions of s. 64 of the NLC. In the first place, a revocation can only be effected in accordance with s. 64(1). Secondly the process requires the publication of a notice, and thirdly an enquiry to the held in respect of the proposal of revocation must also be specified therein.

**[17]** The alleged failure of the State Authority to ensure compliance with s. 64(1) is an excess of jurisdiction of the provisions of the NLC, thus rendering the decision to revoke to be a nullity. The State Authority cannot be allowed to take advantage of its own wrong whether due to inadvertence or otherwise of its failure to gazette.

**[18]** Further, the State Authority's power to alienate land, in accordance with ss. 41, 42 and 76 of the NLC is confined only to State lands, which by definition pursuant to s. 4 of the NLC does not extend to reserved land. The power to dispose of reserved land is provided for in s. 62(4)(a) which is clear in allowing for the same to be effected only under the limited situations which do not apply in the instant case.

**[19]** As such, the applicant contended that since the said land remained a reserved land in the absence of evidence of revocation pursuant to s. 64(1), the decision to alienate to the fourth respondent too is a nullity. This is quite simply because as a reserved land under the NLC, as stated, the same can only be disposed of in accordance with s. 62(4)(a) which undisputedly could not have and did not happen in the instant case.

**[20]** The applicant further argued that even if the said land was a State land, its alienation to the fourth respondent would still have been unlawful given that s. 76 of the NLC stipulates that an alienation in perpetuity (which is the situation in the instant case) can only be undertaken if the State land is, *inter alia*, used for a public purpose under s. 76(aa)(ii) or there are special circumstances to do so pursuant to s. 76(aa)(iii). Yet in this case, it is not disputed that the fourth respondent applied for the alienation in order to undertake a private development project. Thus, the applicant contended that additionally, the alienation was *ultra vires* s. 76(aa) of the NLC.

**[21]** The applicant also alleged that the alienation had caused Hotel Sentral to be in violation of various legislation, rules and regulations, relying principally on the affidavit of the architect's professional opinion which averments included the following observations:

> From the Approved Bomba Plans, the Road Reserve is deemed to have been approved by the local authorities (which include MBJB) by their act in approving the Approved Building Plans and by issuing the CF under section 70(1) and 3(a) of the Act [Street Drainage and Building Act 1974 ("SDBA")] and section 25 of the UBBL [Uniform Building By Laws 1984 ("UBBL")]

A ...

The dire consequences are as follows:

(a) Hotel Sentral now contravenes section 70(1) and (3)(a) of the Act as the building no longer complies with the Approved Building Plans/Approved Bomba Plans;

B

(b) Hotel Sentral can be liable on conviction under section 20 subsection 11, 13 and 15 of the Act;

(c) Its basement carpark and off street carparks No. 1 to 13 will be rendered unusable as it no longer accessible;

C

(d) It is also logical to infer that if the said carparks is rendered unusable, it will no longer be compliant to the number of carparking approved and required under the original approved Development Order, as the carparking is clearly indicated in the approved fire fighting plans (usually predicated upon an approved Development Order plans).

D

Apart from the above, the architect's professional opinion also stated that the Hotel Sentral building is in breach of By-Law 140 of the UBBL. As a result of the alienation, the applicant claimed that this leaves Hotel Sentral with a perimeter proportion of 28m being accessible to a fire appliance. This is not in compliance with By-Law 140 of the UBBL as Hotel Sentral requires a minimum of 32.5m of its perimeter being accessible to a fire appliance.

E

**[22]** It was also contended that the alienation to the fourth respondent for development is contrary to the details of land use prescribed by the applicable local plan which had designated the road as a "road reserve". This therefore constitutes a breach of s. 18 of the Town and Country Planning Act 1976.

F

**[23]** The applicant also submitted that the failure by a member of the Johor State Executive Council ("State EXCO") to affirm any affidavit to explain the decisions of the State Authority to revoke the status of reserved land of the said land and the subsequent alienation of the said land to the fourth respondent meant that there is no admissible evidence to clarify the position taken by the State Authority in this case. The affidavit affirmed by an officer representing the first respondent, not being a member of the State EXCO, whose exercise of discretion is being now challenged, would thus be considered pure hearsay and on the authority of the decision of the Court of Appeal in *Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin* [1997] 2 CLJ 248; [1997] 2 MLJ 17 would be worthless evidence since a rebuttal must come from the decision-maker himself.

G

H

**Summary Of Submissions By The Respondents**

**[24]** The thrust of the contention of the first and second respondents (being the Pengarah Tanah dan Galian and Pendaftar Hakmilik, respectively) is that the said land had never been gazetted as a reserved land under the NLC in the first place and is therefore not a reserved land under the law. As such, quite simply, no revocation of any reserved land was necessary.

I

**[25]** The respondents thus urged this court to take judicial notice under s. 57(1)(a) of the Evidence Act 1950 of the fact that the land in question is a State land in the absence of any gazette stating otherwise.

**[26]** The first and second respondents averred that the decision to alienate the said land to the fourth respondent was made by the State EXCO as the State Authority and the applicant should have rightfully made the State Authority a party to this application. The applicant citing the first and second respondents as parties to this application is therefore of doubtful basis.

**[27]** In any event, the first and second respondents argued that the alienation had been lawfully undertaken in pursuance of s. 76(aa)(iii) of the NLC.

**[28]** The third respondent (being the Majlis Bandaraya Johor Bahru) advanced the primary contention that it has nothing to do with the decisions which were sought to be quashed which are plainly within the jurisdiction of the State Authority, which the applicant had failed to make a party.

**[29]** The third respondent further argued that any comments or opinions expressed by the third respondent regarding the application by the fourth respondent for the land in question cannot be construed as a decision which is reviewable in these proceedings. In any event, the third respondent is not empowered under any of the provisions of the Local Government Act 1976 to reverse any decision of the State Authority in having allegedly revoked the "road reserve" and subsequently alienating the same to the fourth respondent. Further, the third respondent submitted that the applicant's argument that the decision on the said land had adversely affected its interest since the only access into and exit from the basement *via* the "road reserve" would not be available is illogical since whatever its status, the said land was not for the applicant's private benefit and could not have been included in the development plans submitted for approval by the applicant.

**[30]** The fourth respondent (MB Builders Sdn Bhd) submitted that the applicant is not an aggrieved person and has no *locus standi* to institute these judicial review proceedings to start with. It did not build Hotel Sentral, did not have in its possession the all-important approved building plans and should really have been more careful in its enquiry on the status and true nature of the adjacent land which plainly is not theirs, and should not have conveniently assumed it to be a reserved land, when it clearly has never been one, in the absence of any gazette to such effect under s. 62(1) of the NLC.

**[31]** It was additionally argued that the architect's professional opinion is based only on the approved Bomba plans, which amendments could have been made subsequent to the original and more crucial building plans approval. This renders the conclusion of the architect's professional opinion speculative if not questionable.

**[32]** The fourth respondent further contended that the alienation of the said land to the fourth respondent in perpetuity was not *ultra vires* the requirement that such alienation must be for a "public purpose". This is because s. 76(aa)(ii) of the NLC concerning "special circumstances" would instead apply, considering that the fourth respondent's original title for Lot 3270 which was surrendered for amalgamation had previously been held in perpetuity.

**Law And Principles Of Judicial Review**

**[33]** The fundamental premise on which judicial review can provide a remedy had been enunciated by Lord Diplock in the landmark House of Lords' decision in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374. In administrative law, judicial review remedies can therefore be granted in respect of the following key categories against relevant governmental and public authorities:

(i) illegality: where the decision maker has not understood correctly the law that regulates his decision-making power and given effect to it;

(ii) irrationality: where the decision is so outrageous in its defiance of logic or of accepted moral standards such that no sensible person who had applied his mind to the question to be decided could have arrived at it; and

(iii) procedural impropriety: where there is a failure by the decision-making body to observe procedural rules that are expressly laid down even where such failure does not involve any denial of natural justice.

**[34]** Not only are the categories not exhaustive (see the Federal Court's decision of *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 AMR 433, but the development of administrative law in Malaysia has also firmly established that whilst judicial review proceedings do not involve the exercise of an appellate function, the merits of the decisions of inferior tribunals can be reviewed in circumstances deemed to constitute an exception to the principle of the role being supervisory in nature (see the Federal Court's decision in *Petroliam Nasional Bhd v. Nik Ramli Nik Hassan* [2003] 4 CLJ 625; [2004] 2 MLJ 288).

**[35]** It is therefore well-established that public authorities and inferior courts must disregard irrelevant considerations nor fail to take into account relevant considerations. A more recent decision of the Federal Court in the case of *Malaysia Airline System Bhd v. Wan Sa'adi Wan Mustafa* [2015] 1 CLJ 295, cited with approval an earlier ruling of the former Supreme Court in *Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers* [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159 which emphasised on the following observation by Jemuri Serjan SCJ (as he then was):

> Unreasonableness here, in our view, was used in the context of the broad sense of that term as expounded by Lord Greene MR in the case of *Associated Provincial Picture Houses v. Wednesbury Corporation* [1948] KB 223.

> "Reasonableness" here embraces the various heads of *ultra vires* - such as misdirecting oneself in law, taking into account irrelevant considerations, or failing to take into account relevant considerations - which is now known as the *Wednesbury* principles …

**[36]** The following passage from the judgment of the Court of Appeal in *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748; [1995] 2 MLJ 317 which provided clarification on the concept of "error of law" is most instructive:

> In my judgment, the true principle may be stated as follows. An inferior tribunal or other decision making authority, whether exercising a quasi-judicial function or purely an administrative function has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not. If an inferior tribunal or other public decision taker does make such an error, then he exceeds his jurisdiction. So too is jurisdiction exceeded where resort is had to an unfair procedure (see *Raja Abdul Malek v. Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 CLJ 619), or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision.
>
> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an *Anisminic* error) or if he misconstrues the terms of any relevant statute, or misapplies or mis-states a principle of the general law.
>
> Since an inferior tribunal has no jurisdiction to make an error of law, its decisions will not be immunised from judicial review by an ouster clause however widely drafted.

**[37]** It is therefore incumbent upon the High Court in any judicial review application to make the evaluation whether there had been any shortcomings that would tantamount to a defect in the *Wednesbury* unreasonableness sense, comprising either an illegality, irrationality, procedural impropriety or proportionality, or otherwise involving an error of law which could justify the court invoking the public law remedies prayed for. In the instant case, the focus would be on the decisions which are contended to have revoked the said land as a road reserve, and alienated the said land to the fourth respondent. I will now examine these issues.

**Evaluation And Findings Of This Court**

*Decision To Revoke*

**[38]** It is observed from various records and documents which can be said to have originated from all the respondents that the said land, or the road between Lot 2897 and the former Lot 3270 is apparently designated or at

A least referred to as "road reserve". The applicant contended that the said land, which it claimed to be reserved land, was not revoked by the State Authority in accordance with s. 64 of the National Land Code ("NLC") before its alienation to the fourth respondent. It has been well established that the requirements of s. 64 must be strictly adhered to in order to effect
B revocation of reserved land. It provides as follows:

> 64. Revocation of reservation.
>
> (1) The reservation of any land for a public purpose (whether effected under this Act or the provisions of any law in force at any time before the commencement thereof) may, subject to sub-section (2), be revoked
C by the State Authority at any time, either as respects the whole of the land or as respects any part or parts thereof.
>
> (2) Where it is proposed to revoke any reservation in pursuance of sub-section (1), notice of the proposal shall be published in the Gazette together with details of a time and place at which an enquiry will be held
D with respect thereto by the State Director; and the State Authority-
>
> (a) shall not revoke the reservation until it has considered a report by the State Director setting out the nature of any objections to the proposal received by him at the enquiry, and his observations thereon and on the proposal generally, but
>
> E (b) may thereafter revoke the reservation, either in accordance with the proposal as published, or in accordance with the proposal modified in such respects as the State Authority may consider necessary or desirable.
>
> (3) Copies of any notice published under sub-section (2) shall be published
F in accordance with the provisions of section 433.
>
> (4) Any lease of reserved land subsisting at the time the reservation is revoked under this section shall continue in force notwithstanding the revocation?

**[39]** The Federal Court in the case of *Government Of The State Of Negeri*
G *Sembilan v. Yap Chong Lan & Ors And Another Case* [1984] 2 CLJ 150; [1984] 1 CLJ (Rep) 144 had this to say on this point:

> No revocation of the reserved Land comprised in parts of the four titles alienated to Lesco has in fact been effected under the provisions of Section 64(2) but the learned Judge held that the provisions of this
H sub-section are directory and not mandatory, that compliance there with in the circumstances of this case would be a mere formality and that the failure to formally revoke the subsisting vegetable garden reserve in the affected portions of the four titles pursuant to the stipulated statutory provisions did not vitiate the alienation of the land in question to Lesco. We must dissent on his conclusion as to the purport and effect of
I Section 64. The compelling provisions of Section 64 can hardly be said to be merely directory, and the phraseology of the provisions of sub-section (2) thereof clearly connotes a mandatory requirement which necessitates

compliance therewith before a reservation can be said to have been revoked. Applying the test laid down in the judgment of this Court in *Pow Hing & Anor v. Registrar of Titles, Malacca* [1980] 1 LNS 120; [1981] 1 MLJ 155 (at p. 157) and even on a consideration of the *adhibition* of the doctrine of substantial compliance enunciated by this Court in *Ng Yit Seng & Anor v. Syarikat Jiwa Mentakab Sdn Bhd & Ors* [1981] 1 LNS 47; [1981] 2 MLJ 194 (at p. 195), *it is clearly manifest that until and unless revocation has been effected under Section 64, reserved land will continue as such, and compliance with this statutory requirement as a prerequisite to revocation cannot be circumvented by treating an essential legislative stipulation as a mere formality.*

(emphasis added)

**[40]** The critical question is thus the threshold issue of whether it is indeed a "road reserve" in the sense that it is a reserved land under the law. For only if it is, can the applicant pursue its case to then challenge the decision which is said to have revoked the status of the said land as a reserved land. Section 5 of the National Land Code defines "reserved land" as follows:

"reserved land" means land for the time being reserved for a public purpose in accordance with the provisions of section 62 or of any previous land law;

**[41]** Section 62(1) of the NLC empowers the State Authority to reserve any State land for any public purpose. It is apposite to state the entirety of the section which reads as follows:

62. Power of reservation of State land.

(1) The State Authority may by notification in the Gazette reserve any State land for any public purpose.

(2) Any notification gazetted under sub-section (1) shall-

(a) describe the reserved land;

(b) describe the purpose for which the land is reserved;

(c) designate the public officer for the time being having the control of the reserved land;

(d) be conclusive evidence that the land so described is reserved for a public purpose.

(3) Copies of any such notification shall be published in accordance with the provisions of section 433.

(4) Without prejudice to the provisions of any other written law for the time being in force, reserved land shall not be-

(a) disposed of by the State Authority except to the extent permitted by, and in accordance with the provisions of, section 63 and Chapters 2, 3 and 4 of this Part, or

A b) used for any purpose other than that for which it is reserved except in pursuance of a disposition made by virtue of any of those provisions.

**[42]** The word "may" in the section is in my view plainly referable to the discretionary power vested in the State Authority to effect land reservation, B which if so exercised is only legally effective if duly gazetted under the same s. 62(1).

**[43]** It is affirmed on behalf of the first and second respondents, and it is in fact not disputed that the "road reserve" was never gazetted. As such, it must therefore mean that the "road reserve" or said land continue and remain C to be State land, including at the material time when it was alienated to the fourth respondent. It is thus clear that not having been gazetted, the said land cannot in law be considered as a reserved land within the meaning and ambit ascribed to it by s. 5 and s. 62(1) of the NLC. Thus, the premise of the applicant's primary contention that assumes the said land being a D reserved land is wholly misconceived and unsustainable.

**[44]** However, the applicant has a riposte to this state of affairs and contended that the State Authority cannot be allowed to take advantage of its own wrong given what the applicant claimed to be the State Authority's failure to gazette the said land as reserved land under s. 62(1) in the first E place. In my view, this argument is equally short on substance and cannot be accepted. It has not been shown by the applicant what is the exact nature of the duty on the part of the State Authority that had allegedly failed to be performed and thus resulted in a wrong or default. It is entirely within the discretionary power of the State Authority to decide whether or not to F reserve any State Land. If, having identified a piece of land to be made reserved land, the State Authority for whatever reasons does not subsequently proceed to gazette the same, it cannot legitimately be said that there is any form of failure or non-compliance on the part of the State Authority. It merely means that the requisite steps for the creation of a reserved land, such G as the gazette and notification under s. 62 are not complete by design or inadvertence as a consequence of which there is thus no reserved land. The State Authority is under no legal duty to ensure the gazetting of a land proposed to be reserved, after one is identified, nor, to state the obvious, even to create a reserve land under s. 62(1) in the first place.

H **[45]** The cases cited by the applicant to support the legal principle that a party cannot benefit from his own breach or default does not in my view advance the position of the applicant. In *Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd* [1999] 3 CLJ 577; [1999] 3 MLJ 489 the Court of Appeal decided that a land owner who erected a warehouse on his land in breach of I the requirement to obtain planning permission should not receive any benefit from it from any compensation to be paid in respect of the acquisition of the land. Similarly, in the other case referred to by the applicant, *Khoo Cheng & Ors v. Pentadbir Tanah Muar* [2008] 3 CLJ 534 the order of forfeiture was

set aside because of non-compliance with a number of mandatory requirements of the NLC. In the case of *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* [2005] 4 CLJ 169; [2005] 6 MLJ 289 the Court of Appeal found a breach of fiduciary duty on the part of the State Government and held instructively on this point as follows:

> The judge, after having correctly held that the plaintiffs' customary communal title attached itself to the first defendant's radical title and that the first and fourth defendants were under a fiduciary duty "to protect the welfare of the aborigines including their land rights", ought to have included the ungazetted area in question for purposes of compensating those settled there for the deprivation of their property rights. **It was open to the judge to have made a finding that the failure or neglect of the first defendant to gazette the area in question also amounted to a breach of fiduciary duty.** The first defendant had knowledge or means of knowledge that some of the plaintiffs had settled on the ungazetted area and that as long as that area remained ungazetted, the plaintiffs' rights in the land were in serious jeopardy. In that state of affairs, by leaving the plaintiffs exposed to serious losses in terms of their rights in the land, the first and/or fourth defendant had committed a breach of fiduciary duty. **While being in breach, it hardly could lay in their mouths to say that no compensation was payable because of non-gazettation which was their fault in the first place.** For these reasons, the plaintiffs were plainly entitled to a declaration that they had customary title to the ungazetted area. This part of the cross-appeal was therefore allowed.
>
> (emphasis added)

**[46]** It is abundantly clear from the authorities that in order to avail oneself of this principle it is trite that a breach on the part of the party said to be taking advantage of his own wrong must first be established. In the instant case, it has not been shown what is the breach or non-compliance on the part of the State Authority that could give rise to the application of the principle.

**[47]** Furthermore, the decision of the Federal Court in *North East Plantations Sdn Bhd lwn. Pentadbir Tanah Daerah Dungun & Satu Lagi* [2011] 4 CLJ 729 concerning alienation of State lands may be of relevance by way of analogy. Alienation is governed principally by s. 78 which states as follows:-

> 78. How alienation is effected.
>
> (1) The alienation of State land under final title shall be effected in accordance with the provisions of Chapter 3.
>
> (2) The alienation of State land under qualified title shall be effected in accordance with the provisions of Chapter 2 of Part Eleven.

A (3) **The alienation of State land shall take effect upon the registration of a register document of title thereto** pursuant to the provisions referred to sub-section (1) or (2), as the case may be; and, **notwithstanding that its alienation has been approved by the State Authority, the land shall remain State land until that time.**

B (emphasis added)

**[48]** The Federal Court firmly held that under s. 78(3) of the NLC, since the process of alienation has not been completed and document of titles not issued, the relevant lands remained as State lands until registration of a register document of title, such that the State Authority may revoke or C withdraw any prior approval of alienation as long as it is before registration of title. In that case, express written approval addressed to the applicant for alienation in respect of a number of lots was revoked although a few others had been registered earlier in favour of the applicant.

**[49]** In the instant case, I would therefore hold that the said land not having D been gazetted, the same would, similar to the outcome in *North East Plantations* continue to be State lands and by virtue of s. 40(a) of the NLC, remain vested solely in the State Authority. For completeness, s. 40 provides thus:

40. Property in State land, minerals and rock material. E

There is and shall be vested solely in the State Authority the entire property in-

(a) all State land within the territories of the State;

(b) all minerals and rock material within or upon any land in the F State the rights to which have not been specifically disposed of by the State Authority.

**[50]** Nor can the applicant argue any breach of legitimate expectation since *North East Plantation*s also ruled that legitimate expectations cannot override the express statutory provisions of the NLC. In that case, it was held that the G applicant had no legitimate expectation that titles would be issued to it when the State Authority revoked the approval for alienation of land earlier granted to the applicant. In the instant case, there is nothing closely resembling the facts of *North East Plantations* in terms of any promise or expectations given to the applicant *vis-à-vis* the use of the said land.

H **[51]** As such given that the said land or "road reserve" is plainly not under the law a reserved land since there is no gazette notification to that effect under s. 62(1) of the NLC, it is manifest that the issue of whether the status of the said land as a reserved land is validly revoked in accordance with s. 64 does not arise. Accordingly, no revocation has taken place in fact and I under the law and there is thus no decision that is susceptible to judicial review because there is no offending act or omission to speak of.

*Is Applicant Adversely Affected By The Decision To "Revoke" & Alienate*

**[52]** That in respect of the challenge against the decision of the State Authority to alienate the said land (being part of amalgamated land under Lot 3270 by way of surrender and re-alienation), I agree with the fourth respondent that the applicant must first show that they are adversely affected or aggrieved by the same. This question is also relevant to the purported decision to revoke but the clear position that the said land is not reserved land means there is no revocation to speak of, rendering the issue of being a person aggrieved to be more appropriately considered in respect of this decision to alienate. It is trite that under O. 53 r. 2(4) any person who is adversely affected by the decision in relation to the exercise of a public function is entitled to make an application for judicial review (see the decision of the Federal Court in *Ahli-ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela Dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-Hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals* [2012] 1 CLJ 805; [2011] 6 MLJ 490). In the case of *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor* [2006] 2 CLJ 532; [2006] 3 MLJ 164, the Court of Appeal ruled that the test of threshold *locus standi* under O. 53 is that the applicant must be adversely affected, and it is for the applicant to demonstrate that the grievance is one that is covered by the factual circumstances contemplated by the scope of being adversely affected, which necessarily calls for a flexible approach given the permutations that could potentially be presented before the courts.

**[53]** In my assessment however, in the first place, even if it were true that the said land or "road reserve" is a reserved land (which it is so plainly not), it is by definition meant for public purposes. Any use or benefit accruing to the applicant such as to use it to gain access to its hotel's basement car park prior to the alienation to the fourth respondent must therefore have been purely on the same basis of what other members of the public could similarly have enjoyed and benefited from. The said land, if it were a reserved land could not lawfully have been intended to specifically benefit the applicant. The applicant themselves are not the original owner of the hotel and its belief or assumption (misconceived as it is) on the status of the said land (following their acquisition of the hotel) being a reserved land without evidence of having undertaken due enquiries on the same with the rightful and appropriate authorities cannot be a legitimate basis for making them an aggrieved party within the contemplation of O. 53.

**[54]** Furthermore, the applicant itself is not in possession of the crucial approved building plans, and in the absence of the same, it is difficult to determine whether access to the car park had actually been approved to be through the said land. Much reliance is placed by the applicant on the affidavit containing the expert report in the architect's professional opinion,

and the fact that the respondents did not produce their own experts to challenge the former, citing the case of *Saeng-Un Udom v. PP* [2001] 3 SLR 1, which the relevant parts of the judgment of the Singapore Court of Appeal state as follows:

> The duties of a judge in dealing with expert opinion are succinctly stated in Vol 10 of *Halsbury's Laws of Singapore* (2000) at [120. 257]:
>
> > As to reception of the evidence, the court may, if there is no definite expert evidence to the contrary, agree with the expert (*Official Administrator Federated Malay States v. State of Selangor* [1939] MLJ 226) but it must not blindly accept the evidence merely because there is no definite opinion to the contrary (*Re Choo Eng Choon, decd* (1908) 12 SSLR 120). Apart, however, from that duty, the duty of the court is largely negative. *Ex hypothesi*, the evidence is outside the learning of the court. Therefore, the role of the court is restricted to electing or choosing between conflicting expert evidence or accepting or rejecting the proffered expert evidence, though none else is offered (*Muhammad Jefrry bin Safii v. PP* [1997] 1 SLR 197). The court should not, when confronted with expert evidence which is unopposed and appears not to be obviously lacking in defensibility, reject it nevertheless and prefer to draw its own inferences. While the court is not obliged to accept expert evidence by reason only that it is unchallenged (*Sek Kim Wah v. PP* [1987] SLR 107), **if the court finds that the evidence is based on sound grounds and supported by the basic facts, it can do little else than to accept the evidence.**
>
> (emphasis added)

**[55]** In my view however, applying the same test enunciated by *Saeng-Un Udom* referred to above, I do not find that the architect's professional opinion can be said to be based on "sound grounds and supported by the basic facts". First, it relied not on the all-important approved building plans but on the approved Bomba plans inclusive of various amendments up to 16 October 2002 which were assumed to have been consistent with the approved building plan (which is unavailable), in respect of which the certificate of fitness for occupation was granted on a later date of 20 June 2003. Thus, the integrity of this premise can certainly be validly questioned since amendments made to the approved Bomba plans relied on by the architect's professional opinion could have been done after the approval of the building plans, rendering the expert report to be potentially speculative if not inaccurate. Secondly, the conclusion of the expert report that the effect of the alienation is to render Hotel Sentral to be in breach of the Street, Drainage and Building Act 1974 and the Uniform Building By-Laws 1984 clearly constitutes an opinion of law which is not admissible. The High Court in *Kassim Sulong & Anor As The Liquidators Of 10 Companies v. Guthrie Estates Holdings Ltd & Ors* [1994] 3 CLJ 186; [1993] 3 MLJ 303 states as follows:

The above exhibits clearly state an opinion of law. Mr Puthucheary rightly submitted that opinion of law was not admissible. I agree with him. It is the function of the court to decide on questions of law. In *Development & Commercial Bank Bhd v. Cheah Theam Swee*, I said:

> The question that arises now is whether the opinion on point of law as contained in H9 is admissible for the purpose of the present application. Order 41 r 5 of the Rules of the High Court 1980 clearly states that: (1) '… an affidavit may contain only such facts as the deponent is able of his own knowledge to prove'; and (2) 'An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof'.
>
> In my opinion, the letters H8 and H9 do not come within the meaning of O. 41 r 5. The two letters are irrelevant and inadmissible.

(see also *Re Application by Dow Jones (Asia) Inc* [1987] 1 LNS 103; [1988] 1 MLJ 222).

**[56]** In addition, the third respondent being the relevant local authority themselves did not suggest in their letter of 8 May 2014 to the lawyers for the applicant that any form of violation on the part of Hotel Sentral of any rules or regulations would ensue in the absence of the said land, as a result of its alienation. It is not disputed that there is a six meter set-back at the boundary of the applicant's land which in fact was highlighted by the third respondent who concluded that the applicant actually has sufficient access to its basement car park, with some adjustments to be made. This thus further supports the view that the conclusions arrived at in the architect's professional opinion on Hotel Sentral to be in breach of the relevant laws and regulations to be of little substance.

**[57]** The applicant is in any event not contending that Hotel Sentral itself would be denied access to and from public road as a result of the alienation of the said land to the fourth respondent. Thus, I agree with the fourth respondent that the predominant and underlying issue is essentially one of internal access within the applicant's own land, specifically its basement car park. That being the case, the hotel owned by the applicant additionally cannot benefit from s. 44(1)(b) of the NLC which entitles the applicant to the support of its land in its natural state by any adjacent land such as that of the fourth respondent. Section 44(1)(b) provides as follows:

> 44. Extent of disposal: general.
>
> (1) Subject to the provisions of this Act and of any other written law for the time being in force, any person or body to whom (under this Act or a previous land law) land has been alienated, reserved land has been leased or a temporary occupation licence (including a licence so styled under a previous land law) has been granted in respect of any land, shall be entitled to:

A (a) the exclusive use and enjoyment of so much of the column of airspace above the surface of the land, and so much of the land below that surface, as is reasonably necessary to the lawful use and enjoyment of the land;

(b) **the right to the support of the land in its natural state by any**
B **adjacent land,** and all other natural rights subsisting in respect thereof; and

(c) where the land abuts on the foreshore or any river or public place, but subject to any express provision in the document of title, lease or licence, a right of access thereto.

C (2) For the purposes of paragraph (c) of sub-section (1), land shall be taken to abut on a river or road notwithstanding that it is separated therefrom by land retained by the State Authority for use in conjunction therewith, or for purposes connected with the maintenance or preservation thereof

(emphasis added)

D **[58]** The hotel and the basement car park, being a relatively recent development, cannot be construed as forming part of the natural state of the applicant's land. In any event, case law authorities have established that s. 44(1)(b) contemplates a situation where activities (for example, excavation works) on one land cause some form of withdrawal of support, in a physical
E sense, to the adjoining land such as resulting in land subsidence suffered by the latter (see the Federal Court's decision in *Guan Soon Tin Mining Co v. Ampang Estate Ltd* [1972] 1 LNS 39; [1973] 1 MLJ 25). The situation in the instant case involves the "withdrawal" of the said land which is claimed to affect not the conditions of the natural physical support or stability to the
F land, but instead the access to the carpark of the hotel of the applicant. This surely cannot be remotely characterised to be envisaged to come within the ambit of the provisions of s. 44(1)(b) of the NLC.

**[59]** Accordingly, I hold that the applicant has clearly fallen short of establishing itself to be a person who is adversely affected or in any validly
G legitimate manner, aggrieved by the decision of the State Authority in its alienation of the said land to the fourth respondent under O. 53 r. 3(4). On this ground alone, this application ought to be refused.

**[60]** As the applicant lacks the requisite *locus standi* to pursue this application given my ruling that it is not a person adversely affected by the
H decision to alienate the said land to the fourth respondent, it is strictly unnecessary for me to examine the legality of the said alienation. Nevertheless, for completeness I shall briefly discuss issues relevant to that specific question, as the law on the same is fairly settled in any event.

I **[61]** It is well established that State Authority has wide powers of disposal. The power of alienation is vested exclusively in the State Authority. Section 42 of the NLC makes this crystal clear. It provides as follows:

42. Powers of disposal.

(1) Subject to sub-section (2), the State Authority shall have power under this Act-

(a) to alienate State land in accordance with the provisions of section 76;

(b) to reserve State land, and grant leases of reserved land, in accordance with the provisions of Chapter 1 of Part Four;

(c) to permit the occupation of State land, reserved land and mining land under temporary occupation licences issued in accordance with the provisions of Chapter 3 of Part Four;

(d) to permit the extraction and removal of rock material from any land, other than reserved forest, in accordance with the provisions of Chapter 3 of Part Four;

(e) to permit the use of air space on or above State land or reserved land in accordance with the provisions of Chapter 4 of Part Four provided that such air space shall be within the confines of a structure of any description erected thereon;

...

**[62]** More relevantly s. 76 permits the alienation of the State lands in perpetuity, as follows:

76. Meaning of alienation.

The alienation of State land under this Act shall consist of its disposal by the State Authority-

(a) for a term not exceeding ninety-nine years;

(aa) in perpetuity-

(i) where the Federal Government requires the State Authority to cause a grant in perpetuity to be made to the Federal Government or to a public authority or where the Federal Government and the Government of the state agree to make a grant in perpetuity to the Federal Government;

(ii) where the State Authority is satisfied that the land is to be used for a public purpose; or

(iii) where the State Authority is satisfied that there are special circumstances which render it appropriate to do so;

(b) in consideration of the payment of an annual rent;

(c) in consideration, unless the State Authority thinks fit to exempt there from in any particular case, of the payment of a premium;

(d) subject, unless the State Authority otherwise directs pursuant to sub-section (5) of section 52, to a category of land use determined in accordance with sub-sections (2) and (3) of that section; and

A (e) subject to such conditions and restrictions in interest as may be imposed by the State Authority under, or are applicable thereto by virtue of, any provision of this Act.

Provided that nothing in paragraph (aa) shall enable the State Authority to dispose of any part of the foreshore or sea-bed for a period exceeding
B ninety-nine years; and paragraph (d) shall not apply to the alienation of land under this Act in pursuance of an approval given by the State Authority before the commencement thereof

**[63]** It is observed that the affidavit of the fourth respondent included the averment that the alienation to the fourth respondent is in respect of and in
C pursuance of an amalgamation which involved another land of the fourth respondent already held in perpetuity. This in my view could reasonably be said to be a legitimate basis of "special circumstances" referred to in s. 76(aa) (iii) of the NLC. At the risk of over-simplification, it would not seem surprising or not in keeping with reasonable expectations that the status of
D the land being alienated in one's favour to be no different from that which is earlier surrendered for subdivision prior to the said subsequent alienation. It is also unnecessary for me to consider whether an affidavit from a representative of the State Authority such as an EXCO member as the decision-maker of the alienation should have been affirmed, and that whether in the absence thereof there is a lack of a satisfactory rebuttal in the sense
E described by the Court of Appeal in *Datuk Bandar Kuala Lumpur v. Zain Azahari bin Zainal Abidin*.

**[64]** I should however state that it is correct for the applicant to have named the first and second respondents in this action instead of the State
F Authority because it is manifestly plain that s. 16(2) of the NLC provides that any action, suit or other proceedings relating to land in which it is sought to establish any liability on the part of the State Authority must be brought against the State Director in the name of his office. The special position of the State Director conferred by the NLC representing the State Authority in dealing with all suits intended to be involving the State Authority ought in
G my view to justify the contention that in appropriate circumstances such as where there are other ready materials that could provide the requisite clarity to any given issue, the insistence on an affidavit from a State EXCO on the same may not be made mandatory. This is especially the case, like the present where, the issue revolves around the powers of disposal of the State
H Authority, which are wide and not disputed, and that where the possible reason for the alienation in perpetuity is also far from being inherently improbable as explained in the affidavit by the fourth respondent. In this connection, I am not convinced and do not consider that the applicant has successfully shown that there is any form of error of law that can justify the
I intervention of public law remedy of *certiorari* against the decision to alienate.

## Conclusion

**[65]** In view of the foregoing analysis, primarily given the findings that the said land is not a reserved land, the decision to alienate is not tainted with any illegality, irrationality or procedural impropriety, and that in any event the applicant has failed to establish that it is a person adversely affected by the decision to alienate the said land, this application by the applicant cannot succeed. Accordingly, the application for judicial review in encl. 1 is denied and dismissed with costs.